Supreme Court

of the United States

OCTOBER TERM, 1946

No. 770

THE CITY OF PORTLAND, a Municipal Corporation,

Petitioner, Appellant and Cross-Respondent below,

v.

PUBLIC MARKET COMPANY OF PORTLAND,

Respondent and Cross-Appellant below,

and

RECONSTRUCTION FINANCE CORPORATION and THE FIRST NATIONAL BANK OF PORTLAND (OREGON),

Respondents and Cross-Appellants below.

REPLY BRIEF

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REVIEW OF RESPONDENTS' BRIEF

On page 2 it is said that the "public market building had been constructed according to the city's specifications." This statement if true is far-reaching, because it leads to a false thought that it was a special purpose building suited only for municipal use and therefore that the company when unable to compel the city to take and pay for the property,

should be given damages equalling the amount of difference between the contract price and the market value of the property, and that the city should not be heard to say that it had no power to raise the money to make payment. In reality this thought has no place in the case (1) because there is no allegation of estoppel against the city in respondents' pleadings, and (2) because such allegation if made would be futile inasmuch as a government body is never estopped from showing matters ultra vires.

The statement is not true. The facts are that when the city became interested in acquiring an off-street market operation in place of the Carroll Public Market, it received proposals from several owners; that the city appoint a committee to consider the building plans of the proponents; that upon examining the company's building plan it was found fatally defective in that it violated an easement which prevented the proposed building from being so close to the harbor wall along the west side of the Willamette River unless the footings were carried to a depth equal to or exceeding the depth of the wall footings; that the plans failed to show such depth of building footings; that such violation might cause both wall and building to fail; that a conference was held between the city's structural engineers and the company's president with the result that the company concluded to narrow the building rather than incur the expense of putting the footings down to the required depth;

that this conclusion was approved by the city's committee although it entailed much changing in the plans from top to bottom of the building; that some other suggested changes were made by members of the city's committee having to do especially with the parking space for motor vehicles, refrigerating space and towers; that the company adopted the suggestions without argument, although these changes involved an additional cost of approximately $100,000.00 but at the same time the committee suggested other changes (especially the cement ratio) whereby a saving of $112,-000.00 could be made; (W T 777-781; 799-817) that the company had its own architects draw the plans to incorporate the changes; that both sets of plans are in evidence and show that they were drawn by the same architects; that by comparison, the details of the changes can be seen (see Ex. 12A and 12B; W Ex. 16A and 16B); that all this happened before the contract was drawn, and the contract, when drawn, incorporated the revised plans rather than the original plans; that the building thus constructed is as well adapted to a market under private control as under municipal control, and that the building, although planned for a market operation, is well adapted to other uses. (C T 650, 653, 658-668 and 699.) Although there is conflict of evidence on the two points last mentioned, the great weight of evidence, including that of market experts, is that the location and the building were suitable either for a market under private or under municipal ownership (CT 1133-

1158; and C Ex. 1 pp. 39-42 and 65-69). For testimony pro and con re suitability of building for other uses (see CT 110-529; 539-557; 648-1089).

The evidence shows that during the war period the building was used by the Navy for storage and distributing purposes (CT 171, 191), and we think the court may take judicial notice (in view of the amount of publicity given) that, since the war, the building has been sold for use in printing and publishing a daily newspaper. The company is therefore not in the least entitled to a feeling of sympathy because the city was unable to pay for and acquire the property.

After construction began an important change was sought by the company. This related to the heating system which, according to the contract, plans and specifications, was by radiators and pipes intended to connect with a heating plant operated by a utility company. The Market Company found that the pipe line of the utility company was at such distance that the cost of connection would be somewhat burdensome. The company therefore sought approval from the city to a modification of plans so as to provide additional basement area and install a heating plant. This proposed alteration in turn caused other alterations. The City never agreed to the proposed change. Nevertheless, the Company proceeded to install the plant without City

approval, and this added a cost of $17,900.00. (WT 673; Ex. 61 Cert. 30.)

Many minor changes were made during construction, substantially all of which were approved by the City Council. However, there were many things which were listed as building changes which were equipment. (WT 160, 163, 167, 170-174.) They therefore needed council approval only as purchases of equipment. Neither these items nor any of the other items of equipment received council approval for the reason that the company neglected to submit them until after the company had opened and operated the market for several months, found it unprofitable, changed its views about retaining the property as a private enterprise and concluded to force the city to pay the contract price, including the cost of heating plant, building alterations, equipment, materials and supplies, and 10% for making the purchases and 10% of one year's rent for obtaining tenants (CT 1-129; 1237-1243). All of these matters lacked City approval because the Company neglected to give suitable information for action (CT 1-129; 1237-1243).

On page 2 of respondents' brief and elsewhere phrases appear like these, "The City *obligated itself* to accept the property as so improved and to pay a stated price plus certain additions," the city's "obligation to create the special fund;" the City being "guilty of a deliberate repudiation of its *obligations under the contract,*" "nonperformance by the

city in repudiating any and all *obligations under the contract,"* (Res. Brief pp. 3, 5, 6, 8, 10, 12, 13, 14, 15, etc.)

These phrases carry the inference that the city agreed to actually sell the revenue bonds and pay the company and therefore that the judgment for damages is for breach of contract,—ex contractu rather than ex delicto. The contract is printed in full on pages 65-74 of the petition. It contains no covenant that the city will in fact sell the certificates and make payment. It would be void if it contained such provision, for a covenant of this kind would be substantially the same as a direct covenant to pay the money. It would be a violation of the restrictions on the city's power to contract indebtedness.

Although respondents' brief and also the Supreme Court opinions have used language showing confusion of thought, the only theory that can be followed is the theory of damages ex delicto,—separate and distinct from an obligation created by contract, and therefore, theoretically at least, not subject to the restrictions on indebtedness. We think, however, and respectfully maintain, as indicated in the brief accompanying the petition, that public policy as disclosed by the present statute, charter and constitutional provisions, require that the courts no longer follow the ex delicto theory of the local improvement cases. The contractor would then put pressure on the recreant public officer and take mandamus or other suitable action. Only by so doing can tax payers

be protected against raids on public money by designing contractors and by negligent public officials. Only by so doing can the budget law be successfully followed.

Neither counsel for the respondents nor the Supreme Court of Oregon have directly asserted that the theory applied in this case was damages ex contractu rather than damages ex delicto.

Respondents at pages 7 and 29 of their brief mention the fact that the city filed no petition for rehearing after the opinion on appeal from the decree of Judge Wilson, and seem to infer that the city acquiesced. It did not acquiesce. Manifestly a petition for rehearing would have been futile. The city certainly lost no right by not filing such petition. The only thing that the city could reasonably do was to wait for the mandate to the Circuit Court, and then, upon a trial in accordance with the Supreme Court's opinion, seek to prove that the property was worth as much as the contract price (in consequence of which there could be no damage assessed against the city) and at the same time assert the lack of jurisdiction in the Supreme Court to convert the case from equity for specific performance to tort for negligence, set up the city's right under the Federal Constitution and offer proof to show that failure of payment was caused by negligence of the company rather than by negligence of the City.

The case was not ripe for a petition to this court for

certiorari until after the mandate, a new trial in the lower court and final action by the Supreme Court (Schlosser v. Hemhill, 198 U. S. 173, 49 L. ed. 1001 and Footnote; Detroit & M. R. Co. v. Michigan R. Com., 240 U. S. 564, 60 L. ed. 802 and cases in Note on page 803).

The city followed that course. In addition it offered evidence in the trial court showing adequately, as we think, that the company's negligent acts rather than any negligence on the part of the city caused the project to fail. The trial court expressed itself as being restricted by the directions of the Supreme Court, refused to give more than slight consideration to any of this evidence, rejected much of it and rendered a large judgment for damages against the city.

Our point here is that *the city has not had its day in court* on the subject of negligence and liability ex delicto to pay damages. The city has been presented with no complaint containing allegations specifically or at all charging it with negligence in this regard. It has had no fair hearing on the subject of negligence.

Respondents, on page 5 of their brief, refer to pages 12 and 13 of the city's petition as intimating that the case was dismissed by Judge Wilson "because the Market Company failed to amend its complaint to plead damages for breach of a special fund contract" and this is stated as contrary to the fact. Such intimation, however, was not intended for Judge Wilson entered a decree of dismisal because he con-

cluded that the contract created no general obligation and that the company had failed to perform its part of the contract in the matter of making the property a going public market utility in consequence of which a further amendment of the complaint, if otherwise permissible, would be futile.

Respondents mention the fact on page 9, that at the trial before Judge Crawford witnesses in behalf of the city "testified that the proposed security issue would not have been salable, and assert that the trial court held this evidence insufficient to show that the city would not have succeeded in financing the project in the manner contemplated had it made a bona fide and sustained effort to do so." What Judge Crawford actually said was, "There had been no satisfactory showing that with a bona fide and sustained effort upon the part of the city *and all interested*, the certificates could not have been satisfactorily disposed of *within a reasonable time.*" (Page 227, Resp. Brief on appeal from Judge Crawford's decree.)

This statement followed closely the statement at page 226 that "this court is restricted in its inquiry to the matters clearly remanded to it, that is, the ascertainment of the contract price and the value, the difference being the damages if any."

At page 13 respondents assert that the city is contending for "another hearing upon the question whether it was at fault or 'negligent'." Respondents are far afield. They well

know that the city has been adjudged guilty of negligence without prior charge of negligence and without a hearing on such charge. A judgment of $1,135,676.07 has been entered against the city on the theory of negligence, although the city has had no day in court on that subject. An examination of the briefs before the Supreme Court of Oregon on appeal from the decree of Judge Wilson (and these briefs are now before this court by stipulation) will show that the major part of the controversy concerned the interpretation of the contract as creating a general obligation on the part of the city, the extent of the city's indebtedness as compared to the debt limitation, the extent of the city's annual tax levy necessary for municipal government as compared with its tax levying restriction, the effect of the budget law and power of the state board (State Tax Supervising and Conservation Commission) to eliminate proposed expenditures, all of which would render the contract void if interpreted as creating a general obligation. Other grounds for denying specific performance were that the evidence showed that there was no clear meeting of the minds on the point that the city assume a general obligation if the contract be thought to impose a general obligation on the city; that the company's conduct was not exemplary so as to move the court to grant specific performance, if the company were found otherwise entitled to specific performance; that the company had not fully performed the contract on its part and was, therefore, in no position to claim specific per-

formance on the part of the city; that the city could not pay the amount of the contract price even if it had assumed a general obligation and this was because it had no borrowing power, no tax leving power and no means of selling utility certificates.

As to the last point it was maintained also that the certificates could not have been sold even if the city had had power to make a proper mortgage and issue the certificates. The company's brief made no claim that the second amended complaint included a charge of negligence against the city or allegations on which to claim damages ex delicto. It did claim, however, as it claimed in argument and brief before Judge Wilson after his first opinion, that the company had fully performed its part of the contract; that the court should, therefore, go further and determine what relief should be afforded and that relief should be applied as in street improvement cases, a money judgment for damages ex delicto for the full amount of the contract price. The city's brief in the Supreme Court contested this theory as not applicable because the case had not been tried on such theory; that there had been no allegations of negligence; that the trial court, after the case had been tried and decided, had no power to reopen the case, allow the plaintiff to file another amended complaint, make charges of negligence and then proceed to another trial; that the Supreme Court, being a court of review and not one of original juris-

diction, had no greater power (nor as much in this particular), as the trial court and that in any event such procedure would be futile inasmuch as the evidence then before the court disclosed that the company had not fully performed its part of the contract in that the contract by its wording and by the very necessity of the case required that the property be a going public utility to such extent that the certificates would be marketable, whereas the evidence showed that they would not be marketable. (See p. 555 et seq. of Respondents' Brief on said appeal.)

The Supreme Court said that the way for the city to have shown that they were not marketable was to have issued the certificates and offered them for sale, referring here to an old Kentucky case (Denny v. Campbell's Ex'rs, 9 Ky. Law 367) which had been later explained in a way to make it not applicable because of a statute (See Owens v. Kurd, 192 Ky. 146). The court at the same time said that a decree of specific performance in this particular (to require the city to offer the certificates for sale) could not be made in view of changed conditions and loss of interest on the part of the city in having a public market.

The court ignored the facts that *nine* years of litigation had been spent in determining whether the city had assumed a general obligation; that the alleged tender of title papers was made on the basis that the city had assumed a general obligation and was required to make payment before re-

ceiving the title papers; that the city could not issue the certificates without having a clear title to the property and making a trust mortgage to secure them. Yet, the court, without any amendment of the pleadings and without any trial on the subject of negligence, declared that the company had fully performed; that it was entitled to relief; that the relief should be on the theory of the local improvement cases except that the company would be permitted to keep the property and hold the city in damages for such amount as the contract price exceeded the reasonable value of the property, and that, since the evidence before the court was insufficient to show either the reasonable value of the property or the exact contract price the case should be remanded for the Circuit Court to take further evidence to show the value and the contract price, and that *the parties would be allowed to amend their pleadings.*

Counsel for the city were baffled by a situation like that. In view of the provision for amending the pleadings the city's counsel were inclined to interpret the statements concerning the city's liability as not intended as an adjudication,—but if so intended, they were necessarily void because beyond the jurisdiction of the court and in violation of the Federal Constitution. Thus it came about that when the case, after a further period of seven months, was remanded to the trial court and the plaintiff filed a third amended complaint, the city filed an answer setting up its

grounds of defense and showing that it had not theretofore had its day in court; that the opinion of the Supreme Court in regard to the company's remedy was advisory rather than law of the case and that if taken as an adjudication it was void and violated the 14th Amendment of the Federal Constitution. The trial court, on the contrary, held that the defenses set up by the city were immaterial except in so far as they went to the amount of the contract price and the value of the property, and the Supreme Court later affirmed the action of the trial court. Thus it is that the city has not had a day in court and the Federal Constitution has been violated.

Respondents' brief at another place on page 13 asserts that performance by the city "as the contract was finally interpreted by the Oregon Supreme Court, meant *simply a good faith effort* to finance the project through *an issue of securities* and the use of the fund thus raised in the purchase of the property."

This statement ignores the lapse of more than nine years of litigation to defeat the company's unwarranted contention that the city had assumed a general obligation; it ignores the facts above shown that the company never enabled the city to make the mortgage and issue the certificates by making a delivery of title papers or indicating a willingness to enter into an escrow arrangement whereby the city could have made the mortgage and issued the certificates. It

ignores the facts that the company put no one in charge who was an experienced manager in operating a large market project; that it had paid such high overhead salaries and managed the business so negligently that it was known and publicly referred to as "one of the biggest flops there was" and as "a racket". (S Ex. 6, p. 8, W Ex. 48, TW 113; B pp. 258, 259, 261). How then could the city in good faith finance the project through an issue of securities?

Respondents' brief on page 14 contains an assertion that "to imply that the city was ready and willing to perform and that performance was prevented by acts or omissions of the Market Company, *evades the truth.*" No citation of evidence or authority is submitted by respondents as in support of this assertion. On the contrary, the evidence offered on the subject of negligence before Judge Crawford shows that the city was willing to issue and sell the certificates if able to do so; that Earl Riley, then city commissioner and later Mayor, kept in touch with market conditions and found that they would not be marketable if issued; that he, although never favorable to a municipal project like that embraced in the contract, was nevertheless willing to carry out whatever obligation the city was under; that the new Mayor, Joseph K. Carson, Jr., who succeeded George L. Baker, was favorably disposed toward the project although he did not think that the city was under any legal obligation to take over the property; that Ormond R. Bean,

a new commissioner, was not unfavorable to the company; that none of the commissioners had taken an objectionable attitude toward the company except one; that the Council had passed an emergency ordinance to allow certain building alterations; that the Council's Market Committee and the Council itself promptly passed upon all applications for alterations which were made with proper supporting data; that they were ready to pass upon leases, purchases of materials and supplies when furnished proper data for action; that Commissioner Bean, who had succeeded Commissioner Barbur, was as favorable toward the market project as was his predecessor; that the new Mayor, after a consultation with other members of the Council, promptly sent a man to the market to observe operations and be ready to take over in behalf of the city as soon as the company became ready to make delivery; that this man was continued in that capacity for a period of some six months and until the company itself (which had commenced the market operation on December 15, 1933), employed this man and made him Market Manager under its own operation although he had had no tutelage under an experienced manager. The truth is that the certificates could not be issued or sold under the circumstances; that the city was always ready and willing to obtain the market if it could be obtained on the program provided therefor; that the company reneged on that program and engaged the city in a long litigation in an effort to make the city pay as upon a general

obligation; that the company neglected to furnish the city data whereby it could intelligently pass upon the purchase of equipment (one considerable item of which was a sugar mill which on its face was of doubtful propriety); that it neglected to furnish the city proper data for passing upon and approving leases; that it neglected to give the city possession or to offer title papers on a basis which would permit the city to issue utility certificates. (TW 1001-1005; 1008-1010; B 260, 262; TC 136.)

The acts of the company in demanding payment as upon a general obligation was a repudiation of the contract on its part and fully warranted the Council in subsequently repudiating the contract in toto if the action of the Council in rejecting the company's "offer" of title papers may be so interpreted.

The statement on page 14 of respondents' brief that "the city deliberately embarked on a course of repudiation of the contract long before the Market Company tendered the property" is untrue in fact and unsupported by the evidence in the case, as is above shown.

The theory advanced on page 16 that "the complaint invoked the equitable powers of the court to grant whatever relief might be found appropriate if, for any reason, specific performance could not be decreed," is at once challenged. The complaint (~~third~~ 2nd amended) on which the case came to trial before Judge Wilson may be searched in

vain for allegations furnishing a basis for relief like that which the company was seeking. The theory on which it was based is wholly foreign to the theory of negligence ex delicto which the Supreme Court adopted without any change of pleadings and which the Supreme Court proceeded to use as a basis for adjudging the city guilty of negligence, holding it liable in damages and fixing the basis for assessing the damages.

The ~~third~~ 2nd amended complaint was definite and positive in its demand for specific performance by a general obligation judgment against the city. The prayer is that upon the accounting "a decree shall be entered directing defendant City of Portland to pay to defendant Reconstruction Finance Corporation and to plaintiff the amounts ascertained to be due them respectfully," and "that a judgment be entered against defendant City of Portland for the amounts due from it, with interest from the due date of each item" (see pages 18 and 19 of Appellant's Abst. of Rec. on appeal from Judge Wilson's decree). It is true that the prayer asks for "such other and further relief in the premises as to the court shall seem proper * * *," but a prayer of this kind is insufficient to carry relief beyond, or in contradiction of, the allegations and theory of the complaint. (Allen v. Pullman Palace Car Company, 139 U. S. 658, 662; 35 L. ed. 303, 304; 11 S. Ct. 682; 30 C. J. S. 671 "Equity" sec. 215, Note 94.)

On page 17 respondents refer to the dissenting opinion

(page 195 of 160 Or.) when this case was before the court on a demurrer to the sufficiency of the complaint. This opinion, however, does not support the language used by respondents' counsel. It reads thus:

> "Whether or not the plaintiff is entitled to require the city to perform specifically the terms of the contract by proceeding to sell or attempting to sell the public market utility certificates, *or has a right to relief by way of mandamus or some other proceeding, it is not necessary at this time to determine.*"

On page 18 a reference is made to the city's answering brief on appeal from Judge Wilson's decree as being inconsistent. A reading of the brief, however, will fail to show inconsistency. The City of Portland has long been familiar with the ex delicto theory of municipal liability under local assessment proceedings. It has regarded that theory as established in the law of the state in cases where actual negligence is shown on the part of city officials in making and collecting a local assessment for a street improvement. The city's brief at the places mentioned shows, however, that those cases are in tort and that no recovery can be had by the contractor if negligence of the contractor caused a failure of the assessment or if the city officers were not in fact negligent although the fund has not been created (Caruthers v. Astoria, 72 Or. 505, 513; Newberg v. Warren Construction Co., 130 Or. 64, 66).

Other portions of respondents' brief might be answered

in detail but the above seem sufficient to show that the respondents have failed to show that the city has had its day in court as required by the Federal Constitution in so far as the case in its final stage embraced the subject of damages ex delicto.

SUMMARY AND CONCLUSIONS

As a brief summary we submit the following observations:

This case was brought by the Company as a suit in equity for the recovery of a money judgment representing the contract price of the City Market property in Portland.

The Company had acquired this property and secured the vacation of two street ends in order to consolidate three holdings into the one tract described in the complaint, for the purpose of developing and operating a public market.

The Company substantially completed the building and commenced the operation of a public market about December 15, 1933.

The Company operated this public market enterprise with a wholly inexperienced manager at a salary of $800 per month and an equally inexperienced secretary at a salary of $300 per month.

By June 30, 1934, according to the audit made by RFC, the Company showed an operating loss of $11,000 per

month for this period. It continued to operate this market as a losing enterprise until November, 1934, at which time, having demonstrated that the operation was a losing enterprise, it went through the form of making a tender and a demand for the full purchase price. It made no provision for giving security for the utility bonds, and, so far as it lay within its power, it made it impossible for the City to sell the bonds.

It not only had operated the market enterprise at a loss, but it needlessly increased this loss by employing and overpaying incompetent executives. The Company sold its 6% first mortgage bonds to RFC at a 6½% discount. During its period of operation it permitted the interest on these bonds to go into default, and the RFC reduced the interest from 6% to 4%. These factors, of course, all contributed to the ultimate result that the market securities were unsalable.

The sale of these securities at not less than 95% of par (as required by statute, Oregon Compiled Laws Annotated, Sec. 95-1603) was the only source out of which the City could have procured the funds with which to purchase the Market.

In this suit for specific performance, which was changed into an action for damages, the City has been denied any opportunity to have this case tried and decided upon its merits. By the method which the Supreme Court of Oregon

followed, it fixed liability and limited further inquiry to the difference between the contract price and the market value of the property.

Judge Crawford followed the directions of the Supreme Court and disregarded the City's evidence which would have disclosed that no damage was allowable and that the results complained of by the Company were attributable solely to the Company's own negligence and wrongdoing.

Conclusions:

The peculiar and unusual nature of this case and its far-reaching effects if not reversed by this court will open the door for a method of circumventing the 14th Amendment of the Federal Constitution as it applies to the right of a day in court and fair trial. These rights are two of the most precious rights that a civilized people have. They should be preserved inviolable and this court is the last court to which resort can be had for upholding and preserving them.

In the foregoing pages and the brief pteviously submitted we have briefly called attention to some of the outstanding facts which have been presented with the hope of showing a prima facie case that the City of Portland has experienced a very grievous injury because of a violation of its constitutional rights,—a judgment in damages approaching one and a quarter million dollars, and a precedent

(if permitted to stand) will have been established whereby other millions of dollars may be imposed upon this city and other cities unjustly and unfairly and notwithstanding constitutional, charter and statutory restrictions on public expenditures of money and the incurring of indebtedness. Cities and all governmental authorities throughout the United States are affected.

It is respectfully urged that the writ of certiorari be issued to the end that the case may be fully heard on its merits and that suitable action be taken to uphold the constitutional right to a day in court and a fair trial.

Respectfully submitted,

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